Supreme Court, U.S.
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No. 99-949

IN THE

Supreme Court of the United States

KARL L. DAHLSTROM,

Petitioner,

— against —

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In the illegal search and seizure of documents thru criminal trespass and burglary by private persons, does the immediate presence of a Law Officer unlawfully on the private premises of defendant create a co-conspiracy between the private persons and Law Officer that constitutes a Fourth Amendment suppression of evidence under the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Karl L. Dahlstrom petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Fifth Circuit is reproduced in the attached Appendix "A".

JURISDICTION OF THIS COURT

The judgement of the Court of Appeals was filed on July 13, 1999. This Court has jurisdiction to review that judgement pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the exclusionary rule of evidence under the Fourth Amendment of the United States Constitution. The text of the Fourth Amendment is attached hereto as Appendix "B".

STATEMENT OF THE CASE

Petitioner Karl L. Dahlstrom was charged with various crimes relating to the selling of stock in a private corporation to investors and using the funds in the research, development, manufacture, marketing and testing of a fire fighting gel operating in College Station, Texas, to wit; he was convicted of securities fraud, registration and broker-dealer violation and mail fraud under 15 USC § 78j(b), 15 USC

§ 77q(a), 15 USC § 77e(a), 15 USC § 78o(a)(1)i and 18 USC § 1341.

The primary defense of facts in this case involves an illegal search and seizure of property by private persons with a County Deputy Sheriff present to prevent interference by the defendant or petitioner. Six (6) Inferno Snuffers, Inc. (ISI) employees arrived at petitioner Dahlstrom's property (office park) accompanied by a Brazos County Deputy Sheriff and all parties criminally trespassed on the property and burglarized the building holding the documents and papers. The Deputy Sheriff was definitely there to make sure that petitioner Dahlstrom did not interfere by exercising his common-law rights. This was evident by the flashing emergency lights on the patrol car which was driven onto the property and the immediate close intimidating presence of the Deputy Sheriff who was at all times trespassing with his vehicle and person.

Also, when it appeared that documents and papers were being stowed in the trunk of a private vehicle on the property, the Deputy Sheriff stated that, "the person would be in a lot of trouble if he resisted opening the trunk of the automobile." (the Deputy Sheriff's order to open the trunk). Petitioner Dahlstrom repeatedly reminded the private persons and Deputy Sheriff that they were trespassing and demanded that they immediately leave the premises. Throughout the period of time of the illegal criminal trespass and burglary and before, the Deputy Sheriff had to know that the ISI employees did not have any legal authorization or papers to make the trespass, search and seize documents and papers. The bulk of

the evidence used in the prosecution of Dahlstrom came from the illegal search and seizure.

A suppression hearing was held on May 23, 1997 in the District Court and the Motion to Suppress was denied. The suppression of evidence issue was then appealed to the Fifth Circuit of Appeals which affirmed the District Court ruling.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION AT THE HEART OF THE LAW OF SUPPRESSION OF EVIDENCE CONCERNING WHETHER A SEARCH AND SEIZURE BY PRIVATE INDIVIDUALS ACCOMPANIED BY A LAW ENFORCEMENT OFFICER WHO WAS A CO-CONSPIRATOR VIOLATED THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

There can be little debate that several of the various Appellate Courts of the United States have ruled in favor of the Defendant in similar cases, except in recent Fifth Circuit cases. By inference, the U.S. Supreme Court has agreed with these several Appellate Court decisions. The 2nd, 4th, 7th, 9th, 10th and 11th Circuits would have undoubtedly ruled in the defendant's favor. Thus, there is great inconsistency between the Fifth Circuit (recent decisions) and these other six (6) circuits concerning this important issue, meaning that a citizen's rights vary greatly depending on where they find themselves as to geographical location and venue.

A. SECOND CIRCUIT: A search is a search by an official if he had a hand in it. It is immaterial whether the government originated the idea for a

search or joined it while it was in progress. *Lustig v. United States*, 93 L.Ed. 1819 (1949). The government may become a party to a search through nothing more than tacit approval of a private search. *United States v. Knoll*, 16 F.3d 1313 (2nd Cir.)

B. FOURTH CIRCUIT: Absent exigent circumstances, a warrantless search of one's home (or office) or its curtilage by a law enforcement officer, when effected through trespass, violates Fourth Amendment. *United States v. Van Dyke*, 643 F.2d 992 (4th Cir.).

C. FIFTH CIRCUIT: The Court agreed with the dissent's contention that police intervention and aid in this repossession by defendant Chrysler's agents would constitute state action. The Court was supported by earlier decisions of this court. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir.).

D. SEVENTH CIRCUIT: The mere presence of police at the scene of a private act in which they do not participate does not transform the private act into a public one. But there was more here. The eviction was unlawful, and Soldal had a common law right to resist it forcibly. The deputy sheriff prevented Soldal from exercising his right. The record requires us to assume that there was a conspiracy between the private and public defendants (deputy sheriffs) that the deputy sheriffs joined Terrance Properties in a scheme. If so it is as if the deputy sheriffs themselves seized the trailer, disconnected it from the utilities, and towed it away. Equivalently it is as if they had deputized the private defendants to assist them. Thus, on the state of the record, we must regard all of the defendants as having acted

under color of state law. *Soldal v. County of Cook*, 942 F.2d 1073 (7th Cir.).

E. NINTH CIRCUIT: The Court held that mere presence of government agents and their observation of a private person's action do not turn a private search into a joint effort, but that here the officers' presence was more than incidental. They were called in for protection and served as lookouts; they knew the hotel employee was illegally invading defendant's private property and assisted that endeavor as criminal co-conspirators. *United States v. Reed*, 15 F.3d 928 (9th Cir.). In *United States v. Cleaveland*, 38 F.3d 1092, the police detective waited in a parked car approximately one block away from the property. The private party never exceeded his authority under the Customer Service Agreement to go on the property and inspect the meter. There was no unlawful trespassing involved. The Court here compared Reed, supra, where manager rummaged unlawfully through defendant's dresser drawers and luggage while police watched.

F. TENTH CIRCUIT: When a government official affirmatively facilitates or encourages an unreasonable search performed by a private person, a constitutional violation occurs. Police presence, even absent active participation, could provide an intimidating "cachet of legality" establishing a constitutional violation *Specht v. Jensen*, 832 F.2d 1516 (10th Cir.).

G. ELEVENTH CIRCUIT: The police officer's involvement in the repossession at issue here was more extensive than the officers in Menchaca. Here, by contrast, the officer arrived with the repossessor and gave the repossessor a cachet of legality and had the effect of intimidating Booker into not exer-

cising his right to resist. Even if unintended, such an effect could constitute police "intervention and aid" sufficient to establish state action. *Booker v. City of Atlanta*, 776 F2d 272 (11th Cir.).

The Fifth Circuit panel in Dahlstrom apparently did not consider themselves bound by the Seventh Circuit's determination that the individuals' actions did constitute state action because in the U.S. Supreme Court decision, *Soldal v. County of Cook*, 121 L.Ed 2d 540, the Court declined to review that holding of the Seventh Circuit. See note 6, p 458. The Supreme Court in Soldal, supra, in dictum did teach that an individual's action similar to the actions in Seventh Circuit's Soldal, supra would indeed be a state action.

The U.S. Supreme Court in Soldal, supra, also taught that in the absence of consent or warrant, seizure can be justified only if they are unaccompanied by unlawful trespass. Horton, 110 L.Ed 2d 112. Additionally, the Court in Soldal, supra, stated that:

> "In our view the reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question of whether the Amendment applies. What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken . . . for no more reason at all. As we have observed on more than one occasion, it would be anomalous (diverting from a general rule) to say

> that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." (emphasis added).

The Fifth Circuit panel in Dahlstrom apparently refused to recognize that the documents and papers were removed from their location without a warrant as an illegal seizure in addition to an illegal search as was the mobile home in Soldal, supra. Also, the Fifth Circuit panel misreads the District Court's findings. The District Court did not find that there was no illegal search or seizure but that the two (2) point test of Miller or Reed, was not met. The Fifth Circuit panel expanded the test to a three (3) point test and found that the test was not met. See Appendix "A".

The real question is whether the Deputy Sheriff became a co-conspirator in participating in an illegal trespass and burglary in Dahlstrom. In other Circuits, there are cases where the level of illegal participation was much less than in Dahlstrom and the Circuit Court ruled in favor of the person affected.

The law officer in those cases was legally considered a co-conspirator which made the private parties involved the same as a defacto law enforcement officers or they were "stepping into the shoes of a law enforcement officer," in substance. There is then an illegal search and seizure violation in Dahlstrom based on either of two (2) approaches to the co-conspiracy teachings of the U.S. Supreme Court in Soldal, supra. *United States v. Price,* 16 L.Ed.2d 267 at 271 states that;

> "As to the private persons, the District Court held that 'It is immaterial to the conspiracy that these individuals were not acting under color of law' because . . . they were conspiring with persons who were so acting."

Therefore, the first approach of the two (2) approaches would be that the three (3) point test would not be used when a conspiracy between private persons and law enforcement officers is involved making it an automatic illegal search and seizure. The second approach would be to legally consider the private persons as defacto law enforcement officers and apply the three (3) point test used in Dahlstrom. Concerning test point number one (1), the government need not offer some form of compensation because thru the conspiracy no private individuals are involved, only defacto law enforcement officers. In test point number two (2), there would be no private individuals to initiate the idea on their own because there are no private individuals involved, only defacto law enforcement officers who did initiate the idea. And to test point number three (3), the government had specific knowledge of the intended search and seizure because the previously designated private individuals became thru the conspiracy defacto law enforcement officers of the government who had planned and executed the conspiracy in addition to the illegal search and seizure. Thus, the three (3) point test is satisfied in favor of Dahlstrom.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the judgement reversed in the Court below.

Respectfully Submitted,

s/ Karl L. Dahlstrom

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U.S. COURT OF APPEALS
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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 97-21031
97-20237

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Karl L. Dahlstrom and Karla D. Dahlstrom,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES
DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Before KING, Chief Judge, REYNALDO G. GARZA, and Jolly, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

Karl Dahlstrom ("Dahlstrom") and Karla Dahlstrom, Dahlstrom's daughter, appeal their convictions and sentences for securities laws violations.

In February of 1991, Dahlstrom approached Richard Beeman ("Beeman"), a business associate, to discuss the production and marketing of Unisnuff, a gel like substance designed to extinguish oil well fires like the ones raging in Kuwait at the time. Prompted by their discussion, Beeman organized a group of twenty to twenty-five potential investors in Boise, Idaho, for a meeting with Dahlstrom.

At the meeting, Dahlstrom demonstrated the product by showing a videotaped recording of the product putting out a mock oil well fire. He explained that as a result of Saddam Hussain's invasion of Kuwait, the Kuwaity government had expressed an interest in Uni-snuff and that he was looking for investors who would invest a minimum of $10,000. He stated at the meeting that the product's ingredients were approved by the Environmental Protection Agency ("EPA"), that the product was going to be studied by a professor at Louisiana State University, and that contracts for the sale of Uni-snuff were currently pending in Kuwait. He failed to disclose the risks involved with the investment, primarily, that the product's shelf life rendered it commercially useless.

Approximately ten of the investors gathered at the Boise meeting decided to invest in the product. On April 10, 1991, Dahlstrom incorporated Inferno Snuffers, Inc. ("ISI") for the sole purpose of producing and marketing Uni-snuff. On April 19, 1991, ISI signed a six-month lease for office space and lab facilities for $19,000. The office and lab facilities were in a complex owned by Dahlstrom in Bryan, College Station. Tension grew as costly expansions were made to the facility, company vehicles were bought, and large salaries were paid without the investors' approval.

Dahlstrom authorized demonstrations and encouraged the selling of securities to meet the ever increasing need for investment money. Although prior attempts to market the product in Mexico and in Kuwait had failed, investors were told that the product was out of the prototype stage and that it

had been successfully tested on all types of fires. Dahlstrom was aware that the product would separate and rot if it remained in a mixed solution for a few days. He had also been informed that mixing the components at the scene of an actual fire had been overly burdensome and impractical. A report by one of the officers also showed that, although a freshly mixed batch of Uni-snuff would put out regular fires on land, the product did not perform as expected on oil well fires. Despite this information, Dahlstrom continued to hold demonstrations at ISI's facility and covered-up for the product's deficiencies by mixing a fresh batch of Uni-snuff on a daily basis. Investors and contract brokers were continuously reassured that the product was commercially viable.

Karla Dahlstrom was in charge of sending promotional material to potential investors. The promotional materials falsely stated that the company had contracts with two fire fighting companies, when in fact it had negotiated with two contract brokers who were trying to secure a sales contract for ISI. One of the documents falsely stated that the product absorbed enormous amounts of heat without dissipating, which was not true because it evaporated at the same temperature as water. The materials also stated that the flashpoint of the product greatly exceeded the melting point of aluminum, which was also not true, Claims were made that the product was nontoxic and environmentally safe, however, samples of the product had never been sent to the EPA and there was no data to support this conclusion. Videotapes of the product were continuously used as promotional material to attract investors. The recordings falsely stated that the product had

passed Kuwait inspections and was the only fire fighting chemical approved by the Kuwait Oil Company. Investors were told that multi-million dollar contracts were being negotiated with potential buyers and that a patent was pending. Except for a few investors who went to the laboratory and saw the product rotting away, most of the investors and contract brokers were misled into believing that the product was in fact commercially viable and that all of Dahlstrom's assertions were true.

By July of 1991, ISI had exceeded the number of investors permitted under securities laws for non-registered corporations. Rather than turning investors away, investors were placed into trusts. Richard Lopez, who had previously applied for a license to sell public securities, became concerned that the "piggybacking" scheme was illegal and informed Dahlstrom and Karla Dahlstrom about his concerns. Karla Dahlstrom, who was in charge of placing the investors in the trusts, complained that she was signing documents that Dahlstrom did not want to sign. Dahlstrom argued that the thirty-five investor limit could be circumvented by placing the added investors into trusts and that it was a grey area of the law that could never be proven.[1]

Concerns regarding the unregistered sales of securities by non-brokers also grew as more people invested and commissions were paid. Two ISI employees informed Dahlstrom that a license was re-

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[1] Inferno Engineering ("IEC") was incorporated on July 10, 1991. Dahlstrom created the company to allow for an additional thirty-five investors because ISI had already reached its thirty-five investor limit under securities laws. The companies, however, were intermingled and ISI and IEC were in reality the same company.

quired if the person selling the securities received a fee. Dahlstrom tried to circumvent the law by designating the commissions as "consulting fees." Don Ballard ("Ballard"), who had three million shares of ISI, was paid 10% commission fee off of the $80,000 to $100,000 he raised for ISI through a trust. Thirty to forty investors were placed under Ballard's family trust though they had no relationship to Ballard. Dahlstrom hoped to remedy this problem later by merging with a public corporation.

In September of 1991, Dahlstrom received a letter from the State Securities Board advising him that it had information that ISI was offering and selling securities to the general public. The letter advised that under Texas law, securities offered for sale to the general public had to be registered and had to be sold by registered dealers, unless an exemption could be found. The letter also advised that the antifraud provisions of the Securities Act applied to the offer and sale of securities and to all statements and representations in connection therewith.

Shortly after receiving the letter from the State Securities Board, Dahlstrom's attorney suggested that they stop selling stock until they received proper advise from a competent securities attorney. A meeting that same month with a law firm undeniable revealed that the money had been raised improperly and that a recision offer was needed. The firm informed both Dahlstrom and Karla Dahlstrom that they had to stop piggybacking new investors and that the problem with the product's shelf life had to be fully disclosed. Furthermore, investors should be given the opportunity to either: (1) sell back their

stock to ISI; or (2) keep their investment after the disclosure was made.

Despite counsel's advise, Dahlstrom and Karla Dahlstrom continued to sell securities through November and October of 1991. An audit later that year revealed that the company had raised $1.6 million by selling stock through September 30, 1997, and another $.0458 million through December of 1991. There was a total of 706 investors who resided in twenty-five different states. The audit reflected no sales of the product for the company and a net loss through December of 1991, of $1,036,279 and $2,114,143 through April of 1992. It wasn't until April of 1992 that a formal recision offer was made available to stockholders. The company, however, did not have enough money to fund the recision offer.

Dahlstrom and Karla Dahlstrom were indicted on August 14, 1996 for committing fraud in connection with the purchase and sale of securities and in the offer and sale of securities ("Count II and III"), for selling unregistered securities ("Count IV"), for acting as an unregistered broker or dealer in the sale or purchase of securities ("Count V"), for mail fraud ("Count VI through Count XVI"), and for conspiracy to commit the same violations ("Count I") in violation of 15 U.S.C. §§77e(a) and (c), 77q(a), 780(a)(1), 78j(b), and 18 U.S.C. §§2, 371, 1341. The jury convicted Dahlstrom on Counts II through VI, Counts IX through XIV, and XVI; Karla Dahlstrom was convicted on Counts IV and V. Dahlstrom was sentenced to seventy-eight months imprisonment on Count II and sixty months on the remaining counts, to run concurrently. Karla

Dahlstrom was sentenced for forty-six months imprisonment. Dahlstrom and Karla Dahlstrom (collectively "the Dahlstroms") were ordered to jointly pay $1,997,003 in restitution.

This appeal followed.

I.

On May 11, 1992, a group of ISI employees and a Sheriff arrived at the Dahlstroms' place of business. The ISI employees forced themselves into Karla Dahlstrom's office and proceeded to remove ISI property. The Dahlstroms argue that the bulk of the documentary evidence used against them at trial was illegally seized in violation of their Fourth Amendment rights. They contend that the Sheriff's presence gave the unauthorized act an air of legality and that this inhibited their attempts to retain control of the documents. The Dahlstroms also assert that the district court erred in finding that the ISI employees were not acting as agents or instruments of the government.

This Court has treated a district court's determination of whether a person is acting as a government agent as a factual finding. *United States v. Blocker*, 104 F.3d 720, 725 (5th Cir. 1997) (citing *United States v. Jenkins*, 46 F.3d 447, 460 (5th Cir. 1994)). We review the denial of a motion to suppress the district court's factual findings under the clearly erroneous standard and its conclusion of law *de novo*. *United States v. Blaker* 104 F.3d at 725 (citation omitted) . A factual finding is clearly erroneous if after reviewing the entire evidence this Court is left with a firm conviction that a mistake has been

committed. Id. n.2, (citing *Anderson v. City of Vessemer City, S.C.*, 470 U.S. 564, 573 (1985)).

The Fourth Amendment applies only to government action. Evidence that is retrieved by a private individual may be admitted at a criminal trial. *Walter v. United States*, 447 U.S. 649, 656 (1980). It may be determined, however, that an individual acted on behalf of the state or as an agent or instrument of the state if the record shows that: (1) the government has offered the individual some form of compensation for the search; (2) if the individual did not initiate the idea on his own that he would conduct the search; and (3) the government lacked specific knowledge that the individual intended a search. *United States V. Ramirez*, 810 F.2d 1338, 1342 (5th Cir.), *cert. denied sub nom. Alegria-Valencia v. United States*, 481 U.S. 1072 (1987) (citing *United States v. Bazan, Jr.*, 807 F.2d 1200, 1204 (5th Cir. 1986)).

The Dahlstroms argue that their case is similar to the Seventh Circuit case, *Soldal v. Cook County, Illinois*, 506 U.S. 56, 62 (1992), where the Supreme Court decided that the unauthorized towing of a mobile home constituted a Fourth Amendment violation. In *Soldal*, the Supreme Court specifically declined to address the Seventh Circuit's determination that the individuals' actions constituted state action. *Id.* at n.6. The Supreme Court reviewed the Fourth Amendment issue on the premise that the state had removed the mobile home from its location without a warrant.

After reviewing the district court's decision and record, we find no evidence supporting the argument that the ISI employees acted as agents of the state.

The individuals conceived the plan on their own and solely for their own benefit. The officer's presence was merely requested to keep the peace. In addition, the government did not acquire possession of the documents until much later through proper discovery proceedings. Therefore, we find no evidence supportive of the Dahlstroms' argument that the ISI employees and the Sheriff colluded to seize the documents. Accordingly, we hold that the Dahlstroms' Fourth Amendment rights were not violated.

II.

The second issue on appeal is whether the involvement of the same attorney who represented the Securities and Exchange Commission ("SEC") in an underlying civil action warrants a reversal of the convictions in this case. SEC attorney Phillip W. Offill, Jr. ("Offill") had previously represented the SEC in a civil action arising from the same facts. An agreed judgment was entered in that case which required Dahlstrom to pay approximately $307,122. A criminal indictment was then presented by United States Attorney Gaynelle Griffin Jones, by an through Assistant United States Attorney Quincy L. Ollison. Offill contributed in the government's prosecution of the Dahlstroms. The Dahlstroms maintain that Offill's participation constitutes plain error due to an appearance of impropriety by his in-depth participation. They argue that Offill's participation violates their right to prosecution by an impartial prosecutor.

We review whether Offill's participation in the criminal proceedings warrants reversal for plain error. *United States v. Carter*, 907 F.2d 484, 488

(5th Cir. 1990). Reversal for plain error is appropriate only where the alleged error was obvious, substantial, and, if not corrected, would seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Morrow*, No. 96-50958, 1999 WL 329712, at *3 (5th Cir. May 25, 1999).

In *Young v. United States ex rel. Vuitton et Fils. S.A.*, 481 U.S. 787 (1987), the Supreme Court addressed a similar issue. The Court reversed the Second Circuit because the district court appointed as a special prosecutor the same attorney who had previously filed a trademark infringement claim against the defendants. *Id.* at 791. The Court noted that a prosecutor's duties is to represent the United States and not the party that is the beneficiary of the court order allegedly violated. *Id.* at 804. In *Young*, the court noted that "[t]he prosecutor is appointed solely to pursue the public interest in vindication of the court's authority." *Id.* Given that the prosecutor may be swayed by other interests due to a conflict in roles, the Court held that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order. *Id.* at 808.

In *United States ex rel. S.E.C. v. Carter, 907* F.2d 484 (5th Cir. 1990), we reversed the district court because it appointed as special prosecutors the same attorneys who had previously represented the SEC in the underlying civil action. In light of Supreme Court's holding in *Young*, we turned to the Ninth Circuit's holding in *FTC v. American National Cellular*, 868 F.2d 315 (9th Cir. 1989) for guidance. In *American National Cellular*, the Ninth Circuit

implemented a two-factor test in resolving that a Federal Trade Commission attorney, who had served in both the civil and the criminal case, had in fact served the public interest and not a private interest. *Id.* at 318. The two factors considered in reaching this decision were: (1) the level of participation by the U.S. Attorney; and (2) the extent of the particular agency attorney's involvement in the underlying civil suit. *Id.* We consider, once again, the Ninth Circuit's test in determining whether Offill's participation in the criminal and underlying civil suit violated the Dahlstroms' rights to an impartial prosecutor.

Although the record shows that Offill had participated intensely in the civil suit, this Court is unconvinced that he retained control over the prosecution. As stated in *Carter*, we consider whether the prosecuting attorney may have been tempted to pursue nonmeritorious claims in exchange for useful information in their underlying civil litigation. *Carter*, 907 F.2d at 487. In the case before us, it is clear that the United States Attorney's Office ("USAO") was in control of this case and that Offill's participation does not merit its reversal. In *Carter*, the SEC attorney was the final decision maker and in full control of the prosecution's case. *Id.* at 488. In the present case, the record shows that criminal prosecution was initiated by the USAO and that Offill was essentially assisting a disinterested prosecutor. The Supreme Court states in *Young*, "[t]he familiarity may be put to use in assisting a disinterested prosecutor in pursing the contempt action, but cannot justify permitting counsel for the private party to be in control of the prosecution." *Young*, 481 U.S. at 806. Since Offill

did not have control of the prosecution, we hold that the Dahlstroms' rights were not violated by Offill's participation in their criminal prosecution.

III.

The third issue raised on appeal deals with the sufficiency of the evidence pertaining to the following counts: Counts II, fraud in the connection with both the purchase and sale of securities; Count III, fraud in the offer and sale of securities; Count IV, the selling of unregistered securities; Count V, acting as unregistered broker dealers; and Counts VI-XVI, mail fraud violations in regard to Counts II and III.

This Court will not disturb a jury's verdict "unless the record demonstrates that a rational jury could not have found each of the elements of the offense beyond a reasonable doubt." *United States v. Peterson*, 101 F.3d 378, 379 (5th Cir. 1996), *cert. denied*, 520 U.S. 1161 (1997). In applying this standard, we must view the evidence, and all inferences reasonably drawn from it, in the light most favorable to the verdict, regardless of whether the conviction is based on direct or circumstantial evidence. *Id.* (citing United States v. Ruggiero, 56 F.3d 647, 654 (5th Cir.), *cert denied sub nom. Parker v. United States*, 516 U.S. 951 (1995).

A review of the record evidence, pertaining to each of the points raised by the Dahlstroms in their briefs and oral argument, reveals that the evidence was sufficient to support the jury's verdict on each of the counts charged. Therefore, we are unwilling to disturb the jury's verdict.

IV.

Dahlstrom argues that the district court erred by allowing Elena Szilagyi ("Szilagyi") to testify about another of Dahlstrom's investment funded companies. The evidence was admitted as proof of Dahlstrom's knowledge of securities law and the absence of a good-faith mistake. The district judge gave a standard 404(b) instruction, telling the jury to only consider the evidence to determine intent or motive. Szilagyi described how Dahlstrom raised money from investors for a company Dahlstrom created called OWPEC by demonstrating a chemical formula she developed to dissolve paraffin in oil fields. She testified that OWPEC was funded by investors shortly after the Exxon Valdez oil spill and that OWPEC was merged with another company in order to take the stock public. Dahlstrom argues that the prejudicial effect of the testimony outweighs the probative value of the testimony. Thus, he maintains that this case must be granted a new trial.

This Court reviews a district court's ruling regarding the admissibility of evidence for abuse of discretion and will reverse a district court's ruling only if it affects a substantial right of a party. *United States v. Ramirez*, No. 97-11208, 1999 WL 261638 at *4 (5th Cir. May 3, 1999).

In order to be admissible under the Federal Rule of Evidence 404(b), the evidence of the defendant's prior bad acts must be: (1) relevant to some issue other than the defendant's character; and (2) its probative value must be greater than its potential to unfairly prejudice the jury. *United States V. Conzalez-Lira*, 936 F.2d 184, 189 (5th Cir. 1991) (citing *United States v. Beechum*, 582 F.2d 898, 911

(5th Cir. 1978) (en banc) , *cert. denied*, 440 U.S. 920 (1979)).

A review of the record reveals that the admitted testimony demonstrates a scheme almost identical to the Uni-snuff plan. The similarity between the plans is probative of Dahlstrom's knowledge or intent while he was actively seeking funding from investors through ISI. Due to these similarities, coupled with the fact that the district court specifically instructed the jury that the testimony was admissible only as to evidence of a common scheme or plan and not as to Dahlstrom's character, the evidence was in fact more probative than it was prejudicial. Therefore, we hold that the district court did not abuse its discretion by allowing Szilagyi's testimony into court.

V.

Dahlstrom asserts on appeal that the district court erred by assessing $1,997,003 against him and by finding that Dahlstrom had abused a position of trust. Dahlstrom maintains that a twelve point increase in the presentence report ("PSR") was erroneous because the appropriate amount of loss was $145,320. This represents the amount he personally received as wages and as expense reimbursements. Dahlstrom's principal contention is that ISI and IEC were not worthless companies, and therefore the district judge should have offset their value against the deposited amounts. He argues against a two point increase in the PSR by stating that his control over ISI and IEC should not be determinative of the trust issue. Dahlstrom contends that the enhance-

ment should not be applied because he did not owe nor breached any fiduciary duties.

A sentencing court's factual findings are reviewed for clear error. *See United States v. Navarez*, 38 F.3d 162, 166 (5th Cir. 1994), *cert. denied*, 514 U.S. 1087 (1995). As long as the finding is plausible in light of the record as a whole, it is not clearly erroneous. *United States v. Sowels*, 998 F.2d 249, 251 (5th Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994). Interpretations of the Sentencing Guidelines are reviewed *de novo. See United States v. Thomas*, 973 F.2d 1152 (5th Cir. 1992)

In *United States V. Oates*, 122 F.3d 222, 225 (5th Cir. 1997), we stated, "[t]his Court has long adhered to the view, supported by the relevant application note, that the amount of loss for the purpose of determining a base offense level in United States Sentencing Guidelines ("U.S.S.G.") § 2F1.1(b) (1) is the dollar amount placed at risk by a defendant's fraudulent scheme or artifice." We interpret comment number seven of § 2F.1 as specifically stating that the defendant will be held responsible for the amount of injury he attempted to inflict, even if that loss is greater than the actual loss. *Id.*

As to the two point increase for Dahlstrom's position of trust within the company, we determine that an abuse of position of trust is imposed if a defendant's job places the defendant in a superior position to commit a crime and the defendant takes advantage of that superior position to facilitate a crime. *United States v. Brown*, 7 F.3d 1155, 1161 (5th Cir. 1993). In this case, Dahlstrom occupied a position of trust as president and CEO of ISI. His unique position contributed to the commission and

concealment of the crimes and toward the misallocation of ISI's investment money. Dahlstrom breached his fiduciary duty to the investors by failing to disclose the blatant legal problems that afflicted ISI and by failing to disclose the commercial ineffectiveness of the product.

Accordingly, we hold that the district court did not abuse its discretion by attributing a twelve point increase against Dahlstrom for the money that was put at risk of loss and a two point increase for the position he held within the company.

VI.

The final issue on appeal is whether the district court erred by ordering that Dahlstrom and Karla Dahlstrom each pay a total of $1,997,003 in restitution fees. The government argues that the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. §3663, authorizes restitution when the subject offense involves a scheme, conspiracy, or pattern of criminal activity. The Dahlstroms contend that there is no legal basis for the district court's orders and that even if § 3663 were applicable, there is insufficient evidence to show that they were involved in a common plan or scheme to defraud the investors.

We review the legality of the district court's order of restitution *de novo*. *United States v. Hughey* 147 F.3d 423, 436 (5th Cir.), *cert. denied*, 119 S.Ct. 569 (1998) (citing *United States v. Chaney, 964* F.2d 437, 451 (5th Cir. 1992)). "Once we have determined that an award of restitution is permitted by the appropriate law, we review the propriety of a particular award for abuse of discretion." *Id.*

A review of the record demonstrates that all of ISI's investors were victims of a common scheme to be defrauded. We note that although in two of Dahlstrom's counts he was acquitted, there is an overwhelming amount of evidence that shows that all of the investors were affected by Dahlstrom's actions. Since the whole of the investors shared a common interest in ISI and the evidence is sufficient to establish that Dahlstrom's actions affected all of their investments, we conclude that a common plan to defraud existed. Therefore, we hold that the district court did not abuse its discretion by ordering Dahlstrom to pay restitution.

A review of the record shows that Karla Dahlstrom is subject to a supervised release as part of her sentence. In *United States v. Bok*, 156 F.3d 157, 166 (2nd Cir. 1998), the court determined that although restitution may not be directly permitted under § 3663(a), a district court may order restitution within the context of a supervised release. Title 18 U.S.C. §3583 (d) explicitly provides that the court may order, as a further condition of supervised release, "any condition set forth as discretionary condition of probation in § 3563 (b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." 18 U.S.C. § 3583(d). One of the discretionary conditions referred to in § 3563(b) is the requirement that the defendant make restitution to a victim of the offense. 18 U.S.C. § 3563(b)(2). The Second Circuit interpreted §§ 3583(d) and 3563(b) to permit a restitution award regardless of the limitations set out in § 3663(a). *Id.* We agree with the Second Circuit's rationale.

In light of the fact that Karla Dahlstrom is subject to a supervised release, and the presence of evidence in the record supporting the finding that she was involved in a common plan or scheme to defraud the investors, we hold that the district court did not abuse its discretion by ordering her to pay restitution to the victims.

Accordingly, for the aforementioned reasons, we AFFIRM the district court's decision in all respects.

APPENDIX "B"

AMENDMENT IV — SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.